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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 883.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, et al.,

Petitioners,

vs.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY,
A corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit.

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Petitioners,

vs.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, A corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Ninth Circuit.

Petitioners herein are the Brotherhood of Locomotive Firemen and Enginemen; Frank W. Glass, individually and as vice president of the Brotherhood of Locomotive Firemen and Enginemen; J. H. McCarvel, individually and as general chairman of the Brotherhood of Locomotive Firemen and Enginemen; Brotherhood of Railroad Trainmen; H. E. Nevala, individually and as deputy president of the Brotherhood of Railroad Trainmen; and R. R. McLean, individually and as general chairman of the Brotherhood of Railroad Trainmen.

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on January 10, 1961, affirming an order of the United States District Court for the District of Montana, entered March 8, 1960, denying petitioners motion for leave to file a supplemental answer and counterclaim.

CITATIONS TO OPINIONS BELOW.

The order of the District Court is unreported, and is printed in the Appendix hereto, *infra* p. 42. The opinion of the Court of Appeals is unreported and is printed in the Appendix hereto, *infra* p. 33.

The opinion of the District Court in the original action is reported in 168 F. Supp. 911; the opinion of the Court of Appeals is reported in 268 F. 2d 54, and is printed in the Appendix hereto, *infra* p. 47.

JURISDICTION.

The judgment of the Court of Appeals was rendered on January 10, 1961.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

Respondent initiated proceedings under Section 6 of the Railway Labor Act seeking to change the existing collective bargaining agreements between it and petitioners relating to switching operations of ore cars at an open pit copper mine of Anaconda Company known as the Berkeley Pit. Services of the National Mediation Board were invoked under Section 5 of the Railway Labor Act by petitioners. Respondent, a wholly owned subsidiary of The Anaconda Company, and The Anaconda Company declined to maintain the status quo while the dispute pended before the National Mediation Board and transferred the work in dispute to another craft, employees of Anaconda Company, represented by International Union of Mine, Mill and Smelter Workers.

Upon announcement by employees represented by petitioners of a strike because of respondent's refusal to

maintain the status quo pending the mediation proceedings, the respondent obtained a temporary restraining order from a Montana state court against the threatened strike. The case was transferred to a United States District Court because of the presence of a federal question. The District Court dissolved the injunction, holding that respondent and Anaconda Company had violated the provisions of the Railway Labor Act which preclude the changing of the status quo while the dispute is being mediated by the National Mediation Board. The Court of Appeals affirmed and this Court denied a Petition for Certiorari.

While respondent's appeal of this decision was pending before the Court of Appeals, the employees of The Anaconda Company represented by the International Union of Mine, Mill and Smelter Workers obtained a temporary restraining order from a Montana state court prohibiting The Anaconda Company from transferring the disputed work of switching ore cars at Berkeley Pit from employees of Anaconda Company represented by Mine, Mill and Smelter Workers, to the employees of respondent represented by petitioners.

Petitioners filed a supplemental answer and counterclaim in the District Court seeking injunctive relief to prevent the Mine, Mill and Smelter Workers progressing the suit in the Montana state court or attempting to secure compliance with the temporary restraining order, and seeking an order requiring respondent and The Anaconda Company to restore the status quo by returning the disputed work to petitioners. The District Court denied petitioners leave to file the supplemental answer and counterclaim and the Court of Appeals affirmed. The questions presented are:

1. When a dispute arising under the Railway Labor Act and pending before the National Mediation Board is made the subject of a suit by a carrier for injunctive relief and it is determined by the District Court that the carrier violated the provisions of the Act which forbid alterifig the status quo of working conditions while the dispute is being mediated, was it error for the District Court to refuse to allow supplemental pleadings to be filed on behalf of the employees, after judgment in their favor, setting forth facts occurring subsequent to judgment, which justify affirmative equitable relief for the employees.

2. Where after judgment denying carrier injunctive relief on ground that carrier had failed to maintain the status quo of working conditions during a dispute with its employees under the Railway Labor Act, does a subsequent state court injunction prohibiting the carrier from restoring the status quo justify allowance of leave to employees to file supplemental pleadings seeking enforcement of the mandatory provisions of the Railway Labor Act.

3. Where supplemental pleading after judgment setting forth facts subsequently occurring which justify affirmative equitable relief is necessary to achieve substantial justice by vindicating employees rights under the Railway Labor Act, did the District Court abuse its discretion by denying leave to file such supplemental pleading.

4. Whether the employees were precluded by the provisions of the Federal Rules of Civil Procedure from seeking affirmative equitable relief after judgment to compel the carrier to comply with Sections 2, Seventh, 5, First, and 6 of the Railway Labor Act.

STATUTES INVOLVED.

The statutory provisions involved are parts of Sections 2, 5 and 6 of the Railway Labor Act, as amended (44 Stat. 577 (1926), 48 Stat. 1185 (1934), 45 U. S. C. Sections 151-163).

Section 2. Seventh, Railway Labor Act (45 U. S. C. Section 152, Seventh):

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 5, First, Railway Labor Act (45 U. S. C. Section 155, First):

> "First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.
>
> "The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.
>
> "In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor

as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to enduce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Section 6, Railway Labor Act (45 U. S. C. Section 156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of services of the Mediation Board."

STATEMENT.

This litigation began March 13, 1958, with the filing of a complaint by the respondent in a state court located at Butte, Montana, against the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, and certain of their officers. A temporary restraining order was issued by the state court on March 13, 1958, which prohibited the respondent's employees represented by petitioners herein from leaving their employment to strike. The case was removed to the United States District Court for the District of Montana. The District Court had jurisdiction because the case arose under the laws of the United States relating to commerce, the Railway Labor Act, and the amount in controversy exceeded the sum of Three Thousand Dollars ($3,000.00). The labor dispute which precipitated the threatened strike originated in the following manner:

The respondent carrier is a wholly owned subsidiary of The Anaconda Company. The principal officers of respondent carrier are also the principal officers of The Anaconda Company. A major transportation service rendered by the carrier is the movement of ore trains from The Anaconda Company's copper mine at Butte, Montana, known as Berkeley Pit, to the smelting plants operated by The Anaconda Company at Anaconda, Montana, a distance of about 26 miles. The carrier also renders a common carrier service to industries along its line of track. It is engaged in interstate commerce and is subject to the Railway Labor Act.

The Brotherhood of Locomotive Firemen and Enginemen represents, for the purposes of the Railway Labor Act, the crafts of engineers and firemen employed on the carrier. The Brotherhood of Railroad Trainmen similarly represents the trainmen and switchmen crafts employed

by the carrier. Collective agreements negotiated by the two Brotherhoods with the carrier provide that road and switching crews shall consist of five employees, to wit, an engineer, a fireman, a conductor, and two brakemen.

During a period of two years or more before this litigation began the work of switching and loading freight cars with ore taken from the Berkeley Pit, and combining these cars into trains, was performed by employees of the respondent carrier in a yard adjacent to the Berkeley Pit known as the Old Berkeley Yard. During 1957 and early 1958 the carrier built for The Anaconda Company a new loading and switching yard some 3,000 feet distant from the old yard. The work of loading and switching ore cars was transferred to the New Berkeley Yard on March 14, 1958.

Late in 1957 the carrier served two notices under Section 6 of the Railway Labor Act on the two Brotherhoods. These notices were requests that the two Brotherhoods agree to certain changes in the terms of their collective agreements. One notice requested that in the future road crews be used to perform the switching work in the New Berkeley Yard when the yard was ready to be put into operation. The second notice requested that the switching work performed in the New Berkeley Yard be performed in the future by a reduced crew consisting of an engineer, an engine foreman, and a helper.

A conference was held on the Section 6 notices on October 10, 1957, when the Brotherhood officers were informed that if they would agree to the proposed collective agreement changes, the carrier's employees would be allowed to continue loading and switching the ore cars when the work was transferred to the New Berkeley Yard. The Brotherhoods' officers initially declined to agree to the

proposed contract changes. Thereafter, on October 25, 1957, the Brotherhoods invoked the mediatory services of the National Mediation Board. A mediator was assigned and a conference under the sponsorship of the mediator was held on January 15, 1958. The Brotherhoods' officers attending the conference again declined to agree to the proposed contract changes, whereupon they were informed that the loading and switching work would be taken from the carrier's employees when the New Berkeley Yard was put into operation and would thereafter be performed by employees of The Anaconda Company. On January 17, 1958, the carrier notified the Brotherhoods that it was withdrawing the Section 6 notices and that in consequence of this withdrawal it considered mediation as ended. Nevertheless, at the request of the Brotherhoods, the National Mediation Board continued its efforts at mediation and requested the carrier to maintain the status quo by continuing to use employees of the carrier to do the work of loading and switching Anaconda ore cars. In a letter dated March 7, 1958, the carrier advised the Brotherhoods that on and after March 14, 1958, the disputed loading and switching work would be performed by Anaconda's employees. Anaconda's employees are represented for collective bargaining purposes by the International Union of Mine, Mill and Smelter Workers.

Following receipt of the March 7, 1958, letter the respondent's employees announced that they would go on strike as of March 14, 1958, because of the carrier's refusal to maintain the status quo in the manner contemplated by Sections 5 and 6 of the Railway Labor Act. The carrier explained its failure to maintain the status quo by asserting that The Anaconda Company, not the carrier, had control over the work of loading and switching ore cars in the New Berkeley Yard.

Employees of the carrier were enjoined from striking by a temporary restraining order issued on March 13, 1958, by the Honorable John B. McClernan sitting as Judge of the District Court of the Second Judicial District of the State of Montana In and For the County of Silver Bow. The case was then removed to the United States District Court for the District of Montana, Butte Division, and the trial was held on July 16 and 17, 1958.

The District Court handed down an opinion in favor of the petitioners herein on November 4, 1958, and judgment was entered on December 9, 1958, dissolving the temporary injunction that had been issued by the Montana state court and dismissing the complaint.

The District Court held, inter alia, that the act of taking from the employees of respondent carrier the work of loading and switching the Anaconda ore cars while the National Mediation Board was exercising jurisdiction over the dispute was a violation of the rights given to railway employees by Section 5, First, (a) and (b), and Section 6 of the Railway Labor Act. The District Court further held that The Anaconda Company, through its ownership and control of the carrier, had undertaken to accomplish indirectly what the carrier could not lawfully accomplish directly, consistent with the Railway Labor Act. Hence, the withdrawal of the loading and switching work from employees of the carrier while the dispute was the subject of continued efforts at mediation by the National Mediation Board was an unlawful act on the part of The Anaconda Company.

Appeal was taken by the carrier from the judgment entered by the District Court on December 9, 1958. At the same time a motion was filed by the carrier with the District Court for an injunction to prevent employees of the carrier from striking during the appeal. This motion was denied on January 15, 1959.

On March 5, 1959, application was made by the carrier to the Court of Appeals for a temporary stay restraining employees of the carrier from striking until such time as the Court of Appeals should rule upon another motion by the carrier for an injunction pending appeal. The temporary stay was granted. In the meantime the appellees moved that the Court of Appeals advance the hearing of the appeal on the merits.

On March 10, 1959, the Court of Appeals granted carrier, appellant, an injunction during the pendency of the appeal, but the injunction was subject to the condition that on or before March 23, 1959, "appellants shall have made a satisfactory showing to this Court that appellant is ready, willing and able to employ members of appellee unions on a five-man crew basis in conducting switching operations at the Berkeley Yard pending determination of this appeal."

A motion to modify the injunction pending appeal was filed by carrier on March 17, 1959. This motion was denied on March 31, 1959. At the same time the injunction that had been granted on March 10, 1959, pending appeal was ordered dissolved effective April 6, 1959. The appeal was set for argument on the merits on April 20, 1959.

On April 3, 1959, a second suit was filed in the District Court of the Second Judicial District of the State of Montana In and For the County of Silver Bow, at Butte, Montana. The plaintiffs in this suit were the Butte Miners' Union No. 1 of the International Union of Mine, Mill and Smelter Workers, and the International Union of Mine, Mill and Smelter Workers. The defendant was The Anaconda Company.

The prayer of the complaint in this second suit was that a temporary restraining order and temporary injunc-

tion issue to prevent The Anaconda Company from transferring the disputed work from its own employees to employees represented by petitioners herein or anyone else and that this injunction ultimately be made permanent. Simultaneously with the filing of this complaint a temporary restraining order was issued by the Montana state court, the Honorable John B. McClernan again sitting as Judge. This order prohibited The Anaconda Company from discharging members of the plaintiff union and transferring the work of moving and loading ore cars in the New Berkeley Yard to members of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen. The temporary restraining order was to be effective until a hearing of an order to show cause, which order was continued without date and has never been heard. The temporary restraining order is still in full force and effect.

On April 15, 1959, petitioners herein filed in the Court of Appeals a Petition for Permission to File Petition for Writ of Prohibition against John B. McClernan, Judge of the District Court of the State of Montana In and For the County of Silver Bow, with supporting documents. The Anaconda Company and the Mine, Mill and Smelter Workers union were also named respondents in this proceeding. The Petition For Permission to File was granted on April 20, 1959, and an Order to Show Cause was issued to the named respondents on the same day.

By this proceeding the petitioners sought to obtain from the Court of Appeals an order staying the proceedings then pending in the Montana state court, and petitioners also prayed that a writ of prohibition ultimately issue from the Court of Appeals to the Montana state court for the purpose of protecting the appellate jurisdic-

tion of the Court of Appeals in the pending appeal, and also protecting its power to ultimately require, through its mandate and the process of the District Court, the respondent carrier and The Anaconda Company to accord to employees of the carrier their rights under the Railway Labor Act.

On May 18, 1959, the Court of Appeals rendered its decision affirming the judgment entered by the District Court on December 9, 1958. On the same day the Court of Appeals denied the Brotherhoods' petition for a writ of prohibition.

The respondent carrier on August 14, 1959, petitioned this Court for a writ of certiorari to review the judgment of the Court of Appeals (No. 311, October Term, 1959). The Brotherhoods on August 11, 1959, petitioned this Court for a writ of certiorari to review the judgment of the Court of Appeals in denying a petition for a writ of prohibition (No. 298, October Term, 1959). This Court denied both petitions on October 19, 1959 (361 U. S. 864).

On November 10, 1959, the petitioners filed in the District Court their motion for leave to file supplemental answer and counterclaim, and tendered the proposed supplemental answer and counterclaim. In the supplemental answer and counterclaim, the petitioners requested that an injunction issue enjoining the Mine, Mill and Smelter Workers from progressing their suit in the Montana state court or attempting to enforce compliance by The Anaconda Company with the temporary restraining order, and that they be enjoined from interfering in any manner with The Anaconda Company in this matter. In addition, the petitioners requested that respondent and The Anaconda Company be enjoined and required to restore the status quo of rules and working conditions under which the em-

ployees represented by petitioners were employed on and prior to March 14, 1959, in connection with the loading and switching of ore cars from the Berkeley Pit.

This motion was duly argued and on March 8, 1960, the District Court issued its order denying petitioners leave to file the supplemental answer and counterclaim. The District Court stated the motion was denied because the judgment entered in the original action was merely concerned with whether or not the carrier was entitled to injunctive relief to prevent its employees from striking and the Court ruled the carrier was not entitled to such injunction because the carrier and The Anaconda Company had violated the rights of respondent's employees to have the status quo maintained in the manner contemplated by the provisions of the Railway Labor Act. The District Court stated it was denying the motion because the judgment entered in the orginal action did not determine that the employees were entitled to a restoration of the status quo of their working conditions. A second ground referred to by the District Court in denying the motion was that if the employees desired affirmative relief from the Court for the purpose of re-establishing the status quo the employees had violated the Federal Rules of Civil Procedure by failing to assert a counterclaim for affirmative relief in the original answer filed by the employees and it was now too late for the employees to seek such judicial aid.

REASONS FOR GRANTING WRIT.

I. The decision below should be reviewed because clearly the questions presented are of importance in the construction and application of the Railway Labor Act. The decision of the District Court establishes an effective and serious hindrance to the enforcement of substantial rights guaranteed to railway employees by the Railway Labor Act, and to efforts of the National Mediation Board to perform its responsibilities under the Act. The question of the enforcement of the mandatory provisions of the Act by railway employees in a suit by a carrier for equitable relief is an important and recurring problem in the labor-management relations field of the railway industry. The question affects the rights of railway employees, the railroad industry, the duties of the National Mediation Board, and the administration of the Railway Labor Act.

The questions involved in this case are important Federal questions because the rulings by the courts below conflict with decisions rendered by this Court. The decision below, in effect, constitutes a distinct limitation upon the exercise of equity powers by a Federal court, in particular, its power to enforce the provisions of the Railway Labor Act. If the decision of the District Court endures, the processes of the Act for the settlement of railway labor controversies will be simply and easily frustrated. Where a dispute precipitates a strike threat and the carrier seeks injunctive relief to enjoin the employees from striking, the District Court's ruling requires that the employees must at that time seek affirmative enforcement of their rights by the court in addition to requesting a declaration of those rights; otherwise the employees will have forever lost the opportunity to secure the enjoyment of their statutory rights by affirmative relief from the court. In effect, the District Court's holding precludes the em-

ployees from assuming that their employer will accord them the rights which the court declares the employees entitled to enjoy and leaves the employees with only the remedy of strike action if the carrier elects not to accord them their rights at the end of the litigation. It will not be sufficient if the employees merely defend against an action by the carrier, relying on a determination of their rights under the Act by the court. The employees will be required to seek affirmative enforcement of all conceivable rights under the provisions of the Act in case the court declares such rights in their favor. Under the holding of the District Court, railway employees are powerless to seek the enforcement of their statutory rights whenever a carrier has previously attempted to secure equitable relief in a dispute, notwithstanding there has been a declaration of the rights of the employees under the Act, and subsequently occurring developments in the dispute necessitates the vindication of such rights by affirmative relief from a Federal equity court.

The District Court's opinion of November 4, 1958, held that petitioners were entitled to continue performing the work of loading and switching The Anaconda Company ore cars on and after March 14, 1958, while the National Mediation Board mediated the dispute under the Railway Labor Act. The responsibility for maintaining the status quo of rules and working conditions as contained in the collective agreements between the petitioners and respondent, as they existed at the inception of this dispute, was declared by the District Court to be a duty of The Anaconda Company as well as a duty of the respondent, owing to the complete control and domination of the respondent by The Anaconda Company and the singleness of purpose that guides the management of these two corporations. The Anaconda Company was bound as a mat-

ter of law to conform to the opinion and judgment rendered by the District Court. *Hart Steel Company v. Railroad Supply Company*, 244 U. S. 294.

Notwithstanding the determination of employees' rights made by the District Court, the processes of the Railway Labor Act were not then followed through to a settlement of the controversy because respondent appealed from the decision of the District Court to the Court of Appeals. It was during the pendency of this appeal that The Anaconda Company was enjoined by a Montana state court, on petition of the Mine, Mill and Smelter Workers, from restoring the work in question to petitioners. Thus, The Anaconda Company found itself in the enviable position of being judicially restrained from doing what it had previously refused to do, notwithstanding the District Court's determination that its actions were unlawful under the Railway Labor Act. The Anaconda Company was thus found by the District Court to have violated the Railway Labor Act, yet was then required by the Montana state court to continue such violation. Petitioners have been required to suffer this continuing violation of their statutory rights even though the District Court determined that rights vested in respondent's employees by the Railway Labor Act had been violated. Self help by petitioners would avail them no realization of their rights in the face of the state court injunction.

The injunction issued by the Montana state court against The Anaconda Company renders meaningless the Federal rights given to respondent's employees, as these rights have been declared by the District Court. In denying injunctive relief to respondent the District Court determined that respondent and The Anaconda Company were violating Section 5, First, and Section 6 of the Act. This conclusion was necessarily preceded by the determination

that the provisions of Section 5, First, and Section 6, were applicable to the dispute and that the rights of the carrier's employees under these sections were being violated. The employees' rights under the Act were thus clearly declared and established by the District Court in the original action, and formed the basis of the denial of injunctive relief to the respondent.

However, the District Court now holds that since the employees did not seek affirmative equitable relief in the original action, they cannot now do so because affirmative relief in an ancillary proceeding is only available where necessary to effectuate the relief given in an original equitable decree.

This holding, we submit, clearly misconstrues this Court's holding in *Root v. Woolworth*, 150 U. S. 401, later affirmed in principle and followed in *Local Loan Co. v. Hunt*, 292 U. S. 234, and *Dugas v. American Surety Company*, 300 U. S. 414. In the *Root* case, a supplemental bill was filed twenty years after the original decree. The supplemental bill sought an injunction to enforce the right to possession under the earlier decree, which had determined title to realty. Affirmative relief had been sought by the plaintiff and granted in the original action, by requiring defendant to execute a conveyance to plaintiff's predecessor in interest. Twenty years after the former action was concluded, a new force arose threatening the enjoinment of plaintiff's rights as determined in the original action. The new force was the re-entry of the original defendant into possession of the property and the granting of releases to third parties. The trial court permitted the filing of an ancillary bill by original plaintiff for injunctive relief and granted the prayer of the supplemental bill. This action was affirmed by this Court.

In affirming the propriety of the ancillary proceedings in the trial court, this Court did *not* hold that a party must seek in the original proceeding affirmative relief to be able later to enforce the determination of their rights when these rights are threatened by subsequent events. Nevertheless, the Court of Appeals in the instant case attached controlling importance to this circumstance when it sustained the ruling of the District Court in the instant case in denying petitioners' motion to file supplemental pleadings.

Petitioners respectfully submit that the court below have totally misconceived the point of emphasis upon which this Court rested its affirmance of the trial court's ruling in the *Root* case, that the filing of a supplemental bill was appropriate procedure for protecting the plaintiff's right to possession of real estate established by a decision of same court 20 years earlier.

When this Court said in its opinion in the *Root* case—

> "But where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle; * * *" (150 U. S. 401, at 411),

and also said—

> "The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties, is well settled." (150 U. S. 401, at 411),

we think it certain that this Court was emphasizing, not the fact that the original litigation was concluded by a judgment which declared that the plaintiff was entitled to receive some form of affirmative equitable relief from the

defendant. Rather, the point of emphasis by this Court was the consistency of the remedy sought in the supplemental bill or ancillary proceeding with the rights established and the affirmative remedy, if any, awarded the plaintiff in the original proceeding.

There are manifest reasons for the requirement that the supplemental bill and the original proceeding must be consistent in theory and relief sought, or, to use the language of this Court, the supplemental or ancillary bill may not seek "to obtain relief of a different kind on a different principle." But there is no reason apparent to the petitioners herein why a party may not seek affirmative relief in a supplemental or ancillary proceeding for the protection or effectuation of legal rights established in an earlier proceeding between the same parties if the earlier proceedings was concluded by a judgment which merely declared the rights of the complaining party but did not include an order or decree giving such party affirmative relief or protection. This Court stated in *Local Loan Co. v. Hunt*, 292 U. S. 234, 239:

> "That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a *judgment or decree* rendered therein, is well settled. *Root v. Woolworth*, 150 U. S. 401, 410-412, 14 S. Ct. 136, 37 L. Ed. 1123; *Julian v. Central Trust Co.*, 193 U. S. 93, 112-114, 24 S. Ct. 399, 48 L. Ed. 629; *Riverdale Cotton Mills v. Manufacturing Company*, 198 U. S. 188, 194 et seq., 25 S. Ct. 629, 49 L. Ed. 1008; *Freeman v. Howe*, 24 How. 450, 460, 16 L. Ed. 749." (Emphasis ours.)

These petitioners know of no rule or principle of law, either substantive or procedural, which required or justified the courts below to deny the petitioners the right to

file their supplemenal answer and counterclaim. The reason for the denial was explained in the following language by the Court of Appeals:

> "The trial court in its original decrees did not order any relief *which can now be further effectuated* by ordering appellee to restore the status quo."

What the District Court did do in the instant case in the original decision was to declare in clear and unmistakable terms that certain legal rights were given by the Railway Labor Act to the employees represented by the petitioners, exactly as if the petitioners' answer in the original proceeding had prayed for a declaration of the employees' rights in the manner contemplated by declaratory judgment procedure. And the affirmative relief prayed for by the petitioners in their supplemental answer and counterclaim does not seek to relitigate issues settled in the original proceeding, nor to alter in any respect the rights and duties of the parties as established in that proceeding. The affirmative relief sought by petitioners in their supplemental answer and counterclaim is simply the protection and effectuation of such legal rights as the original proceeding conclusively established, pursuant to the law of judgments, on the part of the employees represented by the petitioners.

The total absence of reason and sense for such a rule as the lower courts thought they found in the decision rendered by this Court in the *Root* case is easily demonstrated. Suppose the petitioners, when they answered the respondent's complaint while it was before the District Court, had not only resisted the respondent's plea for injunctive protection against the petitioners' threatened strike by claiming those statutory rights which the District Court subsequently affirmed, but had concluded their

answer with a prayer that the District Court protect the rights claimed by the employees by an appropriate form of injunction. Suppose, also, that the District Court had granted the petitioners the relief asked for; that the respondent appealed, as it in fact did, from the decree entered by the District Court; and that while this appeal was pending before the Court of Appeals the Mine, Mill and Smelter Workers sensed and grasped the opportunity, as it in fact did, to nullify the effect of the District Court's declaration of the employees' rights and the injunction that was designed to protect those rights, by pursuading a Montana state court to issue an injunction which made it impossible for The Anaconda Company to give to the employees the rights they were declared entitled to have by the District Court's judgment.

Had this occurred, the lower courts would *not* have found in the *Root* decision a reason for denying the petitioners herein the relief which they sought by their supplemental answer and counterclaim. Yet the entry of a decree granting the employees affirmative relief in the hypothetical situation was followed by a situation which placed all parties and the courts in precisely the same practical situation which they now occupy in the instant case. In short, the issuance of a decree for any form of affirmative relief in favor of the employees in the original proceeding would not have the slightest effect on the dilemma in which the employees now find themselves as a result of the entry of a third power, to wit, the Montana state court, between the employees, the respondent and its parent corporation.

The character of the statutory rights of petitioners which the District Court determined were violated, and which now require enforcement, are important rights given to railway employees by the Railway Labor Act. The peti-

tioners are seeking injunctive relief to enforce the mandatory processes of the Railway Labor Act. The dispute between the petitioners and respondent has been adjudged a dispute under the Act over which the National Mediation Board had assumed jurisdiction. The Act requires, to induce settlement of such controversy, that such disputes be subject to a compulsory process of notice, negotiation, mediation, and conciliation, before either party may resort to self help. If the dispute is pending before the National Mediation Board, the mandate of the Act requires that no change in the status quo of the dispute may be made by the carrier until 30 days after the National Mediation Board has finally acted on the dispute and ended its services. It has been adjudged also that respondent will not have maintained the status quo in this dispute, as required by the Railway Labor Act, until completion of the pending mediation proceedings as required by Section 6 of the Act.

This requirement of the Act, unlawfully disregarded by respondent, is one of the Act's primary commands, judicially enforceable. *Elgin, J. & E. Ry. Co. v. Burley*, 325 U. S. 711, note 12, p. 721. The respondent has completely and effectively evaded the procedures established by the Act and has violated the mandatory provisions of the Act. Thus, the petitioners have been deprived of their statutory rights under the Act; rights which were created by the Congress for the protection of employees' interests and the public, and which have been obliterated in this instance.

This Court has held in a long line of decisions that the Federal courts are broadly empowered to issue injunctions and other appropriate orders to enforce the mandatory provisions of the Act. As stated in *Switchmen's Union v. Mediation Board*, 320 U. S. 300, if the

Federal courts have no jurisdiction "to enforce the statutory commands which Congress has written into the Railway Labor Act," the Act would be "robbed" of its validity and its purpose would be thwarted. The Federal courts have consistently held that the waiting period prescribed by Section 6, which compels maintainence of the status quo, is a judicially enforceable obligation. *Howard v. St. Louis, San Francisco Railroad Company*, 343 U. S. 268.

The purpose of Section 6 of the Act was stated by Justice Rutledge in *Order of Railroad Conductors v. Pitney*, 326 U. S. 561, 569:

> "Section 6 enjoins a clear and positive duty on the part of carriers and employees, a duty which is judicially enforceable since no other remedy is provided. * * * Its object is to maintain the status quo pending the expiration of the period provided by the section for allowing the processes of negotiation, mediation and conciliation to have play. It is to prevent changes being made until these processes have been exhausted or the prescribed waiting period has expired without bringing them into effect."

The inability of respondent and The Anaconda Company to provide important Federal rights given to the employees of respondent by the Railway Labor Act, the defeat of the jurisdiction of the National Mediation Board to mediate a railway labor dispute, and the denial to the employees of the enforcement of their rights under the Act, precipitates Federal questions of substance. Whether substantial rights and duties under the Act may be enforced by railway employees through supplemental pleadings in a suit by a carrier for injunctive relief, pose questions of importance to the railway industry as a whole which should be determined by this court. The holdings below, refusing to allow supplemental pleadings after judg-

ment, setting forth subsequent events necessitating affirmative equitable relief to enforce statutory rights of railway employees, are inconsistent with the principles and reasoning of prior decision of this Court involving the administration of the Railway Labor Act and the exercise of equity powers of a Federal court after judgment. Such conflict in principle and reasoning with prior decisions by this Court requires a review by this Court of the questions involved.

II. The decision below should be reviewed because the case presents an important problem under the Federal Rules of Civil Procedure, regarding the extent to which a party may file supplemental pleadings after judgment to bring new matter before the District Court requiring affirmative relief on behalf of one party. The question of the propriety of supplemental pleadings setting forth facts occurring subsequent to judgment which justify affirmative relief is an important question involving the construction of the Federal Rules of Civil Procedure. The case involves the exercise of the powers of a Federal Court of equity in a situation where substantial justice requires further exercise of the courts' equity powers after judgment.

Petitioners in their supplemental pleading requested that Mine, Mill and Smelter Workers be enjoined from proceeding with the Montana state court action which forbade The Anaconda Company to restore the disputed work to the respondent's employees. Secondly, petitioners requested that respondent and The Anaconda Company be required to restore the status quo of the labor dispute. The necessity for seeking the aid of the District Court for enforcement of the provisions of the Railway Labor Act developed when the Montana state court enjoined The Anaconda Company from restoring the status quo, thereby

preventing petitioners from achieving this result through collective bargaining and the use of economic powers.

The decision below minimizes the significance of the developments in this dispute *after* the judgment of December 9, 1958. At the time the litigation in this case was commenced by respondent, in March, 1958, the primary legal issues involved in the dispute concerned the lawfulness of the action by The Anaconda Company, undertaken in concert with respondent, in removing the work in dispute from petitioners at the time the National Mediation Board was exercising jurisdiction over the dispute by mediating the matter with respondent and petitioner. At this juncture of the dispute, petitioners rightfully presumed that once the legal issues were determined and the rights and duties of the parties were declared by the District Court, all concerned would acquiesce in the decision and fully implement it. Petitioners assumed that The Anaconda Company and respondent would conform to the clear commands of the Railway Labor Act when their responsibilities were determined, and that it would not be necessary for petitioners to invoke the extraordinary powers of a Federal court to enforce by injunction those responsibilities.

Moreover, had this assumption proved to be ill founded because of a refusal by The Anaconda Company and respondent to fulfill their responsibilities under the Act by honoring petitioners' statutory right to a restoration of the status quo of the disputed work, petitioners and the employees they represent were prepared to enforce these rights, by economic force if necessary.

However, after the District Court's Judgment of December 9, 1958, and during the appeal by respondent from that judgment, the deliberate and calculated intrusion of the equity powers of the Montana state court at the in-

stance of the Mine, Mill and Smelter Workers on April 3, 1959, completely frustrated the processes of the Railway Labor Act. It made impossible The Anaconda Company's compliance with the Act and petitioners enjoyment of their rights under the Act. This new occurrence drastically affected the rights and duties of all concerned, and accordingly necessitated petitioners' supplementary plea invoking the extraordinary powers of the District Court. No longer could The Anaconda Company be expected to accord to the petitioners, and the employees they represent, their rights under the Act, and an attempt by the petitioners to force such performance would manifestly be futile.

These significant events occurred *after* judgment was entered in the District Court and while the case was on appeal, so that the petitioners were compelled to request affirmative relief from the District Court through the use of supplemental pleadings.

The decisions below undertake to justify the denial of leave to file the supplemental pleading on the grounds, among others, that (1) relief cannot be had against Mine, Mill and Smelter Workers because such relief would not further effectuate the original judgment, and (2) relief cannot be had against respondent and The Anaconda Company after judgment in the original action. These decisions, if they stand, thus severely limit the traditional power of a Federal court to grant other and further relief after judgment. Under the decisions below the only relief that a court of equity can provide is that relief which is specifically requested before judgment (or within 10 days thereof under Rule 59 (e)) or that relief which further effectuates the relief given in the original decree. The decisions below thus interpret the Federal Rules of Civil Procedure as precluding supplemental pleadings after

judgment where affirmative relief becomes necessary but was not prayed for in the original judgment.

The Federal Courts have traditionally allowed supplemental bills, after as well as before a decree, either in aid of the decree or upon matters omitted in the original decree. A supplemental bill was held proper where new interests arose, either before or after decree, and where relief of a different kind, or upon a different principle from that in the original decree, was required. The traditional supplemental bill in the nature of a bill of review, was employed to bring before the court new matter where a different kind of relief was sought from that on which the original decree was given. See *Story, Equity Pleading*, §§ 338, 351b, 422 (9th Ed. 1879).

This Court has specifically directed the use of a supplemental bill, setting up facts subsequently occurring which justify other or further relief, after judgment, where the action was an appropriate proceeding for the settlement of the entire controversy, *City of Texarkana v. Arkansas, Louisiana Gas Co.*, 306 U. S. 188, 203, citing examples of further action taken after decree, note 29, page 203. See also *Root v. Woolworth*, 150 U. S. 401.

The holding below that petitioners could not now seek the affirmative relief asked in their supplemental pleading because a judgment had been entered in the action, misinterprets the Federal Rules of Civil Procedure and the equity powers of the Federal courts. If the District Court viewed relief from the original judgment as a prerequisite to petitioners supplemental pleading, although petitioners requested only further and other relief not included in the original judgment, the rules make ample provision for such practice. Rule 60 (b) describes procedure which permits the granting of various kinds of relief from judgments

similar to that which was permitted in the Federal Courts under equity jurisprudence prior to the adoption of the Rules. This Rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klappratt v. U. S.* 335 U. S. 601. The supplemental pleadings filed in the District Court were adequate to accomplish relief from the judgment under Rule 60 (b) if the District Court required such motion. "Since nomenclature is unimportant, the moving papers may be treated as a motion under 60 (b), although mislabelled." *Moore's Federal Practice,* Vol. 7, page 299; *United States v. Backofen,* 176 F. 2d 263.

The decisions below similarly misinterpret the Federal Rules of Civil Procedure as precluding affirmative relief for petitioners since the request for the relief of restoration of the status quo was not asserted until the supplemental pleadings. First, it must be noted that relief to which a defendant is entitled in an action may be granted even without a specific demand for relief. The prayer for relief for restoration of the status quo was included in the supplemental pleading along with the showing that such relief was now necessary to secure compliance with the Railway Labor Act because of the intervention, as it were, of the power of the Montana state court. In such circumstances the supplemental pleading provisions of the Rules are adequate to allow petitioners to show subsequent facts which justify further relief.

"Nothing in the Rules of Civil Procedure appears to make pleading by way of counterclaim absolutely essential to the granting of affirmative relief to a defendant, and Rule 54 (c) is broad enough to warrant granting of such relief even though there is no demand for it. Should it be held that a counterclaim is formally necessary, the amend-

ment and supplemental pleading provisions of the rules are amply adequate to take care of the situation." *Cyclopedia of Federal Procedure*, 3rd Ed. Vol. 10, p. 167.

The broad provisions of the supplemental pleading provisions of the Rule imply a ban on strict limitations of time allowed in which to file such pleadings. The purpose of a supplemental pleading is to bring a controversy up-to-date and to introduce facts enlarging or changing such relief, if any, as was sought in the original pleading.

Consistent with the liberal construction of all of the Rules, leave to amend or to file supplemental pleadings has been freely given under Rule 15, commensurate with the requirements of justice, and the Rule is not limited in application to the filing of amendments and supplements before judgment. *Emich Motors Corp. v. General Motors Corp.*, 229 F. 2d 714.

The Sixth Circuit has held in regard to Rule 15 (d) that: "The courts give rules of this kind a liberal construction, always trying where possible to see that cases are decided on their merits" *McHenry v. Ford Motor Company*, 269 F. 2d 18, 25.

Under the circumstances of this case, the refusal of the District Court to permit petitioners leave to file supplemental pleadings must surely be viewed as an abuse of the court's discretion. The action of the District Court was not in furtherance of justice, but was a detriment to justice. Where public rights and interests are involved, as here in the enforcement of the Railway Labor Act, judicial discretion has been held to have more limited boundaries than the field of general discretion which exists in other proceedings. *United States v. 1,997.66 Acres*, 137 F. 2d 8. The present action involves not only private litigants seeking to enforce statutory rights but also involves an attempt to effectuate the commands and policies set forth in a Con-

gressional mandate. Until those policies are effectuated through the vindication of the statutory commands, the courts should lend their assistance to realize the plain will of the Congress.

The decisions below held that petitioners were late in seeking affirmative equitable relief to enforce their statutory rights, and that because of such delay their rights are lost. However, the event which requires petitioners to seek judicial enforcement of their statutory rights occurred on April 3, 1959, during the appeal of this case before the Court of Appeals. These petitioners promptly on April 15, 1959, instituted proceedings in the Court of Appeals seeking protection from the Montana state action. These proceedings were concluded on October 19, 1959, by the denial of a petition for writ of certiorari in this Court. On November 10, 1959, petitioners filed the instant supplemental answer and counterclaim in the District Court. Thus, when the necessity for judicial relief from the Montana state court action developed, petitioners attempted to secure such judicial aid without delay.

If the decision below is allowed to endure, railway employees will be required to secure judicial enforcement for all rights granted under the Railway Labor Act and all compulsory processes of the Act, immediately upon the commencement of any proceeding involving a labor dispute regardless of the necessity for such action at that point in the controversy. Otherwise, the employees will be subject to the bar that they are late in seeking judicial enforcement of their rights under the act although the necessity for the enforcement of such rights does not exist at that point and develops at later stages of the controversy.

The serious misinterpretations of the Federal Rules of Civil Procedure by the decisions below, which impose

limitations on the traditional equity power of Federal Courts to grant further relief after judgment in a proper case, poses questions of importance in Federal procedure which should be determined by this Court.

CONCLUSION.

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 8, 1961.

APPENDIX.

OPINION OF COURT OF APPEALS OF JANUARY 10, 1961.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.
No. 16,882.

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, *et al.*,
Appellants,

vs.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, *et al.*,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA.

Before: BARNES, HAMLEY and JERTBERG, Circuit Judges.

BARNES, Circuit Judge:

This action arises out of a prior adjudication wherein Butte, Anaconda & Pacific Railway Company, appellee herein, sought and was denied an injunction against a strike then contemplated by appellants. (*Butte, Anaconda & Pacific Ry. Co. v. Brotherhood of Locomotive Firemen & Enginemen*, D. Montana, 1958, 168 F. Supp. 911.) Jurisdiction, then and presently, exists because the action arises under the laws of the United States; *viz.* the Railway Labor Act, 45 U. S. C. §§ 151-163, and the amount in controversy exceeds the jurisdictional limit in force when the action was originally filed. 28 U. S. C. § 1331. This Court has jurisdiction on appeal. 28 U. S. C. § 1291.

In late 1957 appellee sought to induce appellants to agree to certain changes in the terms of their employment contracts. Appellee desired that switching crews, which were then composed of five men, be reduced to three men. When appellants refused to accede to appellee's demand, appellee, acting under section six of the Railway Labor Act, served upon appellants notices for changes in their contracts (45 U. S. C. § 6). The services of the National Mediation Board were requested. A few months later, however, appellee attempted to withdraw the section six notices, and to terminate the services of the mediation board. Appellee announced that the switching operations, previously conducted by its employees, would, after a forthcoming change in switching yards, be conducted by employees of its parent corporation, the Anaconda Company. Anaconda Company employees are represented by the International Union of Mine, Mill and Smelter Workers.

Responding to appellee's actions, appellant Brotherhoods issued a strike notice, effective March 14, 1958. On March 13, appellee obtained from a Montana state court a temporary injunction against the strike; because of the presence of a federal question, however, the case was transferred to United States District Court. The District Court concluded that appellee had violated the "status quo provisions" of the Railway Labor Act, which preclude alterations in working conditions after intervention by the National Mediation Board. Thus since appellee was acting in violation of the law, it was not entitled to the remedies provided by a court of equity. Accordingly, the trial court dissolved the injunction. This determination was upheld on appeal in a decision rendered by this court on May 18, 1959. (268 F. 2d 54, *cert. denied* 361 U. S. 864.)

Before oral argument in the appeal just mentioned, the International Union of Mine, Mill & Smelter workers, and its local, Butte Miners' Union No. 1, obtained a temporary restraining order from a Montana state court. This restraining order, which is still in effect, prohibits Anaconda Company from giving loading and switching work, now accomplished by members of the Miners' Union, to members of appellant brotherhoods. Accordingly, a strike by appellants would be futile; appellee cannot restore the status quo so long as its parent is bound by the restraining order in question. To rectify this situation appellants filed a supplemental answer and counterclaim in the federal district court for the District of Montana. The relief sought by appellants is twofold; first they request an injunction preventing the Miners' Union from progressing with their suit in state court or attempting to secure compliance with the temporary restraining order; secondly, they ask for an order requiring appellee to restore the status quo. The district court, however, denied appellants leave to file their supplementary answer and counterclaim. Hence, appellants have taken this appeal.

Appellants contend that the original decree beside dissolving the injunction previously obtained by appellee, also determined that appellee had violated the status quo provisions of the Railway Labor Act. Appellee can be forced to restore the status quo, however, only if it is relieved from the restraining order obtained by the Miners' Union. Thus, appellants contend here, as they did in the court below, that the Miners' Union must be made a party to this dispute in order to enforce the trial court's original decree.

Appellants' argument overlooks the fact that the trial court in its original decree did not order appellee to restore the status quo. True, the trial court did determine that

appellee had violated the Railway Labor Act, but the court made this conclusion only as a logical step on the path to its final decision. And that decision did no more than dissolve the injunction which appellee had originally obtained from a Montana state court. That *restoration* of the status quo was *not* an issue in the original proceeding is conclusively shown by an examination of this Court's review of that proceeding. This Court stated as follows:

> "On similar reasoning we agree with the conclusion of the district court that appellant has not maintained the status quo pending completion of the mediation proceedings, as required by section 6 of the Act. This alone is enough to warrant dismissal of appellant's action for injunctive relief *unless the decree sought to be entered would also require restoration of the status quo.* Neither party has asked for the latter relief. 268 F. 2d 54 at 60." (Emphasis added.)

It thus becomes clear that the error in appellants' argument stems from the confusion of two concepts: (1) *restoration* of the status quo, and (2) *violation* of the status quo provisions of the Railway Labor Act. The former was not an issue in the prior action. The latter was an issue, but its determination was merely an essential preliminary to the court's final determination. Appellants, then, can be successful in their attempt to bring in the Miners' Union as a party only if they first convince the court below or this court it should modify the original decree to require appellee to restore the status quo.

The trial court held, however, that appellants could not now ask for such relief. Did the trial court err in this determination? In our opinion, the trial court was correct in this crucial conclusion, and should therefore be affirmed.

Appellee contends that nothing in the Rules of Civil Procedure entitles appellants at this late date to reopen

and amend the judgment. Rule 59(e) provides that a motion to amend the judgment must be served within ten days of the entry of judgment. Appellants apparently concede that an amendment of the judgment cannot now be made. Appellants contend, however, that they are not seeking to amend the judgment. Their aim is merely to enforce an existing decree; and for such purpose a supplementary bill assuredly will lie. *Root v. Woolworth*, 1893, 150 U. S. 401.

The difficulty with this argument is similar to that which infects appellants' argument in favor of joining the Miners' Union. The trial court in its original decrees did not order any relief *which can now be further effectuated* by ordering appellee to restore the status quo. The court did nothing more than dissolve the injunction against appellant's contemplated strike. As a step along the route to this result the court determined that appellee had violated the Railway Labor Act, but no relief was predicated upon this conclusion other than the dissolution of the injunction. The decree granting that relief is self executing; it cannot be made more effective by any further order or decree.

A consideration of the facts of *Root v. Woolworth*, *supra*, upon which appellants strongly rely, will demonstrate appellants' error. In *Root* a supplemental bill was indeed filed some twenty years after the original decree, but it was a genuine supplemental bill, *further effectuating the original decree*. The original decree, determining that plaintiff's predecessor in interest had paramount title to the realty in dispute, required defendant to execute a conveyance to plaintiff's predecessor in interest. The required conveyance was subsequently executed by a special master. Years later, however, defendant re-entered upon the premises in controversy with the purpose, allegedly, of

inducing people to accept leases under him, thereby driving plaintiff to a multiplicity of actions to re-establish his right to the premises. Accordingly, plaintiff requested an injunction to enforce the original decree. The trial court permitted plaintiff's bill to be filed as a supplemental bill and granted its prayer. In its opinion, affirming the trial court, the United States Supreme Court characterized plaintiff's bill as supplementary *and ancillary* in character, *effectuating the original decree*. The court noted (150 U. S. at 412) that the original decree "necessarily included and carried with it the right of possession to the premises * * *."

Thus in *Root* the *relief* granted in the original decree was of such a nature that it could be and was made more effective by further court order. In the instant case, the relief granted—the dissolution of the injunction—cannot be and will not be further effectuated by an additional decree ordering appellee to restore the status quo.

Appellants contend, however, that the facts, as found by the trial court in the initial action, entitled it to relief it now prays for in its "supplemental pleadings." Under Rules of Civil Procedure, Rule 54(c), the court should enter the relief to which a party is entitled regardless of whether the party has demanded such relief in its pleadings. Granting all that appellants here contend, it would seem that they are tardy in raising these points. If a party, by virtue of Rule 54(c), is entitled to some form of relief beyond that included in the judgment, the time to demand such relief is immediately after the entry of judgment (Rule 59(e)), or at the latest, on appeal. Surely appellants cannot expect to obtain such relief at this late date.

The considerations above presented, in our opinion, are adequate to sustain the trial court's order. The trial court, however, suggested two additional reasons for deny-

ing appellants' motion to file supplemental pleadings. The court pointed out that the occurrences upon which appellants base their claim for restoration of the status quo had transpired before the filing of their answer. Under Rule 15(d), the purpose of supplemental pleadings is to relate events "which have happened since the date of the pleading sought to be supplemented." In response to this point appellants assert that a novel occurrence is to be found in the suit by the Miners' Union against Anaconda Company. This fact, however, relates to the question of whether the Miners' Union ought to be made a party to this action, and not to the question, of whether appellee should have been ordered to restore the status quo.

The trial court also pointed out that appellants' claim for restoration of the status quo is a compulsory counterclaim under Rule 13(a). The "restoration" claim arises out of the same transaction as the claim for an injunction, and it would not require for its adjudication the presence of any third party over whom the court would be unable to acquire jurisdiction. Such a claim must, under Rule 13(a), be included in the original pleading; if it is not, it is lost and cannot later be asserted. *Union Paving Co. v. Downer Corp.*, 9 Cir., 1960, 276 F. 2d 468, 470; *Hancock Oil Co. v. Universal Oil Products Co.*, 9 Cir., 1940, 115 F. 2d 45, *cert. denied* 314 U. S. 666.

Appellants in response to this argument contend that the facts for their counterclaim were pleaded in the original action; all that was omitted was the prayer for relief, and that under Rule 54(c) this omission is immaterial. This argument has already been disposed of. If appellants did in fact plead and prove facts entitling them to a restoration of the status quo, they should have requested long ago that the judgment be refashioned toward that end. Their request now is too late.

In view of the foregoing, we believe that there is no merit in appellants' further contention that Rule 13(f) (omitted counterclaim) applies here. That rule provides that when justice requires, a party may assert an omitted counterclaim by amendment. The interests of justice might be served by permitting appellants to plead now for restoration of the status quo and for an injunction against the Miners' Union. But this request comes late; and it is no loss tardy when it is asserted under the provisions of Rule 13(f). Furthermore, the suggestion which appellants make here is at variance with their contention that they did, in fact, plead the counterclaim in the original action, omitting only to include a prayer for relief. In other words, we do not believe that appellants can claim relief under both Rule 54(c) and Rule 13(f).

One minor matter remains to be considered. Appellee contends that certain of appellants' Specifications of Error are not designated in their Statement of Points on Appeal. This, appellee claims, violates Rule 17(6) of this court; and accordingly, Specifications of Error numbers one, two, three and five should not be considered by this court.

Appellee cites *Greyhound Corp. v. Blakely*, 9 Cir., 1958, 262 F. 2d 401. This case does not support appellee's position. Judge Jertberg in *Greyhound* did say that specifications of error not presented in accordance with Rule 18(2)(d) need not be considered by this court (262 F. 2d at 406), but then went on to say:

> "Notwithstanding defendant's failure to comply with the rule, we will consider the specifications since neither the appellee nor this court has been misled."

Appellee has not asserted that either it or this court has been misled by appellants' asserted failure to comply with

this court's rules. Hence even if appellants' specifications of error are not presented in strict compliance with the court's rules, the court need not but may still consider them. We have chosen so to do. Such consideration, however, leads us to affirm the trial court's holding.

(Endorsed) Opinion Filed Jan. 10, 1961.

FRANK H. SCHMID, *Clerk*.

JUDGMENT OF THE COURT OF APPEALS OF JANUARY 10, 1961.

Appeal from the United States District Court for the District of Montana.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: January 10, 1961
Frank H. Schmid, Clerk

8 1960

ORDER OF THE DISTRICT COURT OF MARCH 18, 1959.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA,
BUTTE DIVISION.

No. 633.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,
Defendants,
by original summons
and
between the said
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,
Plaintiffs,

vs.

THE ANACONDA COMPANY,
a corporation,
BUTTE MINERS' UNION NO. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS,
a voluntary labor association, and
INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS,
a voluntary labor association,
Defendants,
by counterclaim.

ORDER.

Defendants, the prevailing parties in this action, (*Butte, Anaconda & Pacific Railway Co. vs. Brotherhood of Locomotive Firemen and Enginemen, et al.*, 163 F. Supp. 911, affirmed, 268 F. 2d 54, cert. denied 361 U. S. 864) seek leave to file a supplemental answer and counterclaim, bringing in as additional parties Butte Miners' Union No. 1 and International Union of Mine, Mill and Smelter Workers, hereinafter jointly referred to as Mine-Mill, and The Anaconda Company. The relief sought in the counterclaim is twofold. First an injunction is asked enjoining Mine-Mill from proceeding with an action which Mine-Mill commenced in the State District Court against Anaconda, wherein Anaconda was enjoined from operating the New Berkeley Yard with any employees except Mine-Mill members. Second, defendants in the proposed counterclaim seek restoration of the status quo which existed in connection with the loading and switching of cars used in hauling ore from the Berkeley pit prior to March 14, 1959, insofar as the employees engaged in that loading and switching are concerned.

It is defendants' contention that it is necessary for this court to restrain Mine-Mill from proceeding with the State Court action, and in effect to restrain the State Court in order to enforce the decree previously entered by this court in this action. This position misconstrues the effect of the judgment previously entered herein. By that judgment this court did not hold, and did not intend to hold, that the Brotherhoods had a right to strike against the Butte, Anaconda & Pacific Railway. The judgment was simply that under the circumstances shown in this action the Railway Company was not entitled to an injunction to prevent the Brotherhoods from striking because it was itself in violation of the law. The net effect of the court's

decision was simply to deny and dismiss the Railway Company's action for an injunction, and such dismissal has been effected and needs no further enforcing. Nothing that Mine-Mill or the State Court does in the state court action against Anaconda Company can affect or interfere with that judgment of this court.

With regard to the second aspect of the counterclaim, the demand for the restoration of the status quo, this comes too late at this stage of the proceedings:

Rule 13(a) provides:

> "Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. As amended Dec. 27, 1946, eff. March 19, 1948."

Defendants' claim for restoration of the status quo arises out of the same transaction or occurrence as the Railway's claim for an injunction, and would not require for its adjudication the presence of any third party over whom this court could not acquire jurisdiction. Perhaps Anaconda Company's presence as a party would have been required to order the restoration of the status quo, but Rule 13(h) provides for the bringing in of additional parties, and the Court has judicial knowledge of the fact that jurisdiction of Anaconda could be acquired. The claim for restoration of the status quo was thus a compulsory counterclaim which was, under the rule, required to be set up in the answer.

Professor Moore states in Moore's Federal Practice, Vol. 3, page 27:

> "While neither Equity Rule 30 nor the present rule expressly provides that failure to assert a compulsory counterclaim will be deemed to preclude its later assertion, such result was reached under the Equity Rule and has been reached under Rule 13 in accordance with similar reasoning, i.e., that the principle of res judicata applies to all issues that should have been raised, even though actually omitted,"

and many cases are cited.

The seventh paragraph of the Note to the rule states:

> "If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred."

Rule 13(f) provides that when a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment. No showing has been made under this provision of the rule.

For another reason the motion must be denied. The motion to file the supplemental answer and counterclaim is made under the provisions of Rule 15(d) of the Federal Rules of Civil Procedure, which deals with supplemental pleadings. That rule provides in part as follows:

> "Upon motion of a party the Court may * * * permit him to serve a supplemental pleading *setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.* * * *"

All of the transactions, occurrences and events upon which defendants base their counterclaim for restoration of the status quo had transpired prior to the filing of defendants' answer, and were known to defendants at the

time the answer was filed, so that counterclaim is not an appropriate subject of a supplemental pleading. The institution of the state court action between Mine-Mill and Anaconda Company occurred after defendants' answer in this case was filed, but as pointed out above, the fact of the institution of that state court action has no materiality in this case, and hence is not a proper subject of a supplemental pleading in this case.

IT IS THEREFORE ORDERED and this does order that defendants' motion for leave to file supplemental answer and counterclaim be and the same hereby is denied.

IT IS FURTHER ORDERED that the Clerk of this court forthwith notify the attorneys of record for the respective parties of the making of this order.

Done and dated this 8th day of March, 1960.

W. D. MURRAY,

United States District Judge.

OPINION OF THE COURT OF APPEALS OF MAY 18, 1959.

No. 16,372.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

May 18, 1959.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, a voluntary labor association; FRANK W. GLASS, individually and as Vice President of the Brotherhood of Locomotive Firemen and Enginemen; J. H. McCARVEL, individually and as General Chairman of the Brotherhood of Locomotive Firemen and Enginemen; BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary labor association; H. E. NEVALA, individually and as Deputy President of the Brotherhood of Railroad Trainmen; and R. R. McLEAN, individually and as General Chairman of the Brotherhood of Railroad Trainmen,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

Before: Barnes, Hamley, and Jertberg, Circuit Judges.

HAMLEY, *Circuit Judge*:

This action was brought by Butte, Anaconda & Pacific Railway Company to enjoin defendant Brotherhood from calling a strike. The district court after hearing entered a

judgment dismissing the action. The court's findings of fact, conclusions of law, and supporting opinion are reported in 168 F. Supp. 911. Plaintiff appeals.[1]

The principal questions presented here involve aspects of the Railway Labor Act, 45 U. S. C. A., sec. 151 et seq. They are: (1) Whether the controversy was a major or minor dispute under that act; (2) whether the dispute and resultant mediation proceedings had been terminated; and (3) whether during the pendency of the mediation proceedings appellant failed to preserve the status quo, as required by section 6 of the act, 45 U. S. C. A., sec. 156.

Appellant operates a railroad in Montana, hauling freight as a common carrier engaged in interstate commerce. It is a wholly-owned subsidiary of Anaconda, and both corporations are managed by the same staff of officers from president down to secretary-treasurer. All major policy decisions are made for appellant by officers who are also officers of Anaconda. In making such decisions the controlling consideration is the ultimate effect which the decisions will have on the profits earned by Anaconda.

Anaconda owns and, since 1956, has operated an open pit copper mine at Butte, Montana, known as the Berkeley Pit. Prior to March 14, 1958, the ore from this pit was loaded in appellant's ore cars at a loading yard known as the old Berkeley Yard. The work of switching ore cars in the old Berkeley Yard and between that yard and the West Butte Yard was performed by yard crews of appellant. The men in these crews were members of appellee Brotherhoods, and performed such work pursuant to agreements between the railroad and the Brotherhoods.

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[1] Attorneys for The Anaconda Company (Anaconda), International Union of Mine, Mill & Smelter Workers (International Union), and Locals Nos. 1, 16, and 17 of that union, were permitted to appear before this Court as amici curiae.

Under these agreements each yard crew which performed switching service consisted of five men.

Prior to March 14, 1958, a new loading and switching yard, commonly referred to as the new Berkeley Yard, was constructed for Anaconda to serve the Berkeley Pit. Anaconda ascertained that its employees, represented by International Union, were willing to do the switching at the new Berkeley Yard on a three-man crew basis. It therefore decided to do its own switching when the new Berkeley Yard was put in operation. However, the then manager of appellant obtained permission from Anaconda to explore the possibility of having the switching done by the railroad's employees on as economical a basis as it could be done by Anaconda. If this were found to be possible, then Anaconda would continue to contract this switching to appellant as it was then doing at the old Berkeley Yard.

With this purpose in mind, appellant on September 27, 1957, served upon appellee Brotherhoods a so-called section 6 notice under the Railway Labor Act.[2] In this

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[2] Section 6 of the act, 45 U. S. C. A., sec. 156, reads as follows:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

notice appellant proposed an amendment of the existing agreements between it and the Brotherhoods to permit the loading of ore in the new Berkeley Yard with main line crews instead of yard crews. Appellee Brotherhoods rejected this proposal. Appellant then served another section 6 notice in which it was proposed that the existing agreements be amended to provide that the yard crews in the new Berkeley Yard consist of three men rather than five men.

Appellee Brotherhoods declined to agree to such an amendment. On October 25, 1957, they invoked the mediation services of the National Mediation Board. The Board docketed this dispute as Mediation Case No. A-5623. A mediator was assigned to the case by the Board and a conference of the parties under the sponsorship of the mediator was held on January 15, 1958. The Brotherhoods there indicated their continued unwillingness to accept either of the contract amendments proposed by appellant. The railroad then informed the Brotherhoods that when the new Berkeley Yard was put in operation the switching would be done by employees of Anaconda.

On January 17, 1958, appellant notified the mediator and the Brotherhoods that it was withdrawing the section 6 notices, with the intention thereby of terminating the mediation proceedings. The Brotherhoods, however, took the position that in view of appellant's announcement that Anaconda would do the switching at the new Berkeley Yard a dispute necessitating mediation continued. The Board decided to resume active mediation and advised the parties that conferences would begin on March 5, 1958. No progress was made at these conferences.

On March 7, 1958, appellant advised the Brotherhoods that the loading of ore cars in the new Berkeley Yard would commence shortly. The Brotherhoods were

further advised that appellant did not consider the "status quo" provision of the Railway Labor Act as applicable to the contemplated discontinuance of switching service by appellant.[3]

Under the plan for service in and to the new Berkeley Yard developed by appellant and Anaconda, appellant's trains would use Northern Pacific Railroad Company tracks between Durant, Montana, and the new yard. Seeking to take advantage of this fact as a basis for bargaining, the Brotherhoods on March 8, 1958, submitted to appellant a proposed agreement. Under this proposal appellant would be required to pay substantial additional compensation to its railroad employees because of its use of Northern Pacific tracks. It was proposed that the agreement would become effective when Anaconda employees took over the switching at the new Berkeley Yard. It would continue until such switching was returned to appellant's employees represented by the Brotherhoods.[4] Neither the Brotherhoods nor appellant gave a section 6 notice in connection with this proposed agreement.

Appellant apparently rejected the proposed agreement. On March 11, 1958, the Brotherhoods notified appellant that the latter's employees represented by the Brotherhoods woulld strike on March 14, 1958.[5] On March 13, 1958, appellant sent a telegram to the National Rail-

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[3] The so-called "status quo" provision is contained in the second sentence of section 6, quoted in footnote 2.

[4] It is recit d in this proposed agreement that the agreement does not dispose of, set aside, or prejudice the position of the Brotherhoods that appellant was not entitled to turn over the switching work at the new Berkeley Yard to Anaconda.

[5] The reasons given in this strike notice were ". . . the carrier's refusal to negotiate matters in dispute over change of operations and, failing to hold matters which are in dispute, status quo, pending mediation proceedings."

road Adjustment Board calling attention to the Brotherhoods' proposal of March 8, 1958. Asserting that the latter were seeking "to impose severe penalties upon carrier," appellant asked the Adjustment Board to "accept jurisdiction and docket." On the following day the Adjustment Board advised appellant by telegram that jurisdiction could not be accepted on the basis of appellant's telegram. It would be necessary, appellant was advised, to submit the matter "in accordance with circulars one B and C." The record does not indicate that appellant thereafter perfected its submission of this matter to the Adjustment Board.[6]

On March 13, 1958, which was the same day that appellant sent its telegram to the Adjustment Board, appellant instituted this action for injunctive relief. The suit was commenced in the District Court of the Second Judicial District of Montana, in and for the County of Silver Bow. A temporary restraining order was immediately issued by the state court enjoining the Brotherhoods from carrying out their strike threat. Upon being advised of this development, the mediator ceased his efforts at mediation. However, the files in the matter before the Mediation Board remained open.

The cause was thereafter removed to the United States District Court, District of Montana, Butte Division, because of the presence of a federal question. See 28 U. S. C. A., sec. 1331.

In dismissing the action the district court held in effect that (1) the dispute which led to the strike threat

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[6] In June 1958, following the commencement of this action, appellant submitted to the Adjustment Board certain time claims filed by the Brotherhoods, none of which brought into question the dispute which led to the strike threat.

was a "major dispute" within the meaning of the Railway Labor Act and as such had been submitted to the National Mediation Board under section 6 of that act (45 U. S. C. A., sec. 156); (2) appellant could not legally have reduced the number of employees per switching crew from five to three while the section 6 procedure was pending in view of the status quo provision of that section; (3) the status quo provision was circumvented and there was accomplished indirectly what could not be accomplished directly by the act of the parent corporation, Anaconda, in taking over the switching work and employing its own employees on a three-man-crew basis; and (4) a court of equity "will not lend its weight to such purpose by making permanent the temporary restraining order heretofore issued." [7]

Appellant contends that although a section 6 "major dispute" had been in existence it came to an end when the Brotherhoods rejected appellant's proposal, the latter withdrew its section 6 notices, and Anaconda took over the switching operation. Thereafter, appellant argues, any

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[7] The judgment of the district court here under review dissolved the temporary restraining order and, as before noted, dismissed the action. This Court initially enjoined the strike pending disposition of the appeal, subject to certain conditions. The conditions were not fulfilled and on March 31, 1959, the injunction was dissolved, effective April 6, 1959. No injunction has been in effect since the latter date. We are advised that no strike has been called since dissolution of the injunction. This may be due to the pendency of an action in the District Court of the Second Judicial District of Montana in and for the County of Silver Bow. In the latter action, commenced on April 3, 1959, the International Union and one of its locals seek to enjoin Anaconda from returning the switching work at the new Berkeley Yard to railroad employees represented by the Brotherhoods. A temporary restraining order has been granted in that state action. Appellee Brotherhoods have applied to this Court for a writ of prohibition to bring these state court proceedings to a halt pending disposition of this appeal. Brotherhood of Locomotive Firemen and Enginemen v. The Anaconda Company No. 16437.

controversy that remained was either a so-called "minor dispute" concerning which a strike is unlawful, or was no labor dispute at all, thus escaping the sanctions of the Norris-LaGuardia Act.[8] In the latter event, or even if the controversy be regarded as a major dispute, appellant urges, injunctive relief should have been granted. The district court's view that such relief should be denied because appellant did not preserve the status quo is challenged. According to appellant, such a conclusion is possible only if the corporate identity of Anaconda is ignored, and this should not be done.

At the outset it is necessary to note the distinction between so-called major and minor disputes under the Railway Labor Act. In *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U. S. 711, 723, the difference between these two kinds of dispute was explained as follows:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> "The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one independent of those covered by the collective agreement. . . ."

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[8] 47 Stat. 70, as amended, 29 U. S. C. A., secs. 101-115.

As to both kinds of dispute, the act requires that the parties enter into negotiation as the first step towards settlement of the controversy. Where negotiation fails, the procedures diverge. Major disputes go first to mediation before the National Mediation Board; if that fails, then to acceptance or rejection of arbitration; and finally to possible presidential intervention. If all this fails, compulsory processes are at an end, and either party may resort to self-help. *Elgin, Joliet & Eastern Railway Co. v. Burley, supra*, page 725. The Norris-LaGuardia Act prohibits the issuance of an injunction in a railway labor case involving a "major dispute." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U. S. 30, 42.

In the case of minor disputes, if negotiation fails either party may submit the matter to the appropriate division of the National Railroad Adjustment Board. The awards of the several divisions of the Adjustment Board are final and binding. Neither party is permitted to resort to self-help. A strike involving a so-called minor dispute is therefore to be enjoined. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., supra.*

As before noted, appellant concedes that a section 6 major dispute was at one time in existence between these parties. Regardless of the concession, however, there could be no question as to this, since appellant itself gave the section 6 notices. The dispute, which was later submitted to mediation, related to "working conditions," i.e., whether a road crew or a yard crew should do certain switching, and, if a yard crew, how many men would be in the crew. Appellant specifically requested a change in existing agreements concerning these matters. No question was involved as to the interpretation of existing agreements.

Appellant contends, however, that the major dispute involving these matters came to an end when the Brother-

hoods rejected appellant's proposals, the latter withdrew its section 6 notices, and Anaconda took over the switching operations at the new Berkeley Yard.

The action of the Brotherhoods in rejecting appellant's proposals did not serve to terminate the mediation proceeding. Under section 5 of the act, 45 U. S. C. A., sec. 155, several other steps remained to be taken.[9] Likewise, the action of appellant in withdrawing its section 6 notices did not terminate the proceeding. The provisions of section 5 referred to in footnote 9 make it clear that the parties to a dispute under mediation may not unilaterally terminate the proceeding, but are required to follow each procedural step specified in the statute.

If the major dispute was terminated, therefore, it must have been for the reason that after the Brotherhoods rejected appellant's proposals Anaconda took over the switching operation at the new Berkeley Yard. Appellant asserts that when this occurred the subject matter of the dispute disappeared. Since employees represented by the Brotherhoods would not be doing the switching, the argument goes, any question of changing the Brotherhood agreements with regard to such switching operations was rendered moot.

It may be assumed, for present purposes, that where an independent shipper, not acting in concert with a carrier, determines to perform its own switching service on its own property, section 6 mediation proceedings involving a

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[9] The next step was for the Mediation Board to endeavor to induce the parties to submit their controversy to arbitration. If either party had refused to arbitrate, the Board would then have been required to notify the parties in writing that its mediatory efforts had failed. After this had been done, no changes could have been made in the rate of pay, rules, working conditions, or established practices for a period of thirty days unless in the intervening period the parties had agreed to arbitration, or an emergency board had been created under section 10, 45 U. S. C. A., sec. 160.

dispute relative to such service are necessarily terminated.

Here, however, the carrier is the wholly-owned subsidiary of the shipper—Anaconda. The two have common principal officers and the unified purpose of serving the ultimate best interests of the shipper. Under these circumstances the act of Anaconda in taking over the switching service, to be performed by employees represented by another union, must be regarded as the act of the carrier. Otherwise, a carrier by interrelation with its shippers would always have it within its power to circumvent the mediation provision of the Railway Labor Act.

The circumstances of this case are particularly aggravated. With the necessary acquiescence, if not upon the direction, of its parent corporation, appellant gave the section 6 notices. The Brotherhoods and the Mediation Board were entitled to assume that this was a bona fide attempt to invoke the provisions of the act relating to major disputes. As events turned out, it was not, since appellant was not content or able to participate in the proceedings as an independent carrier. On the contrary, it always had it within its power, or so it thought, to terminate the proceeding through action by Anaconda.

We therefore conclude that the major dispute between appellant and the Brotherhoods concerning contract provisions applicable to switching at the new Berkeley Yard still exists. Likewise, the mediation proceedings instituted by appellant in an effort to resolve that dispute are still pending.

Appellant argues that even if this is so, the injunction should have been granted. This contention is based on the premise that the dispute is something different from what it started out to be. Appellant asserts that the dispute which now exists is whether the men represented by appellees are to be allowed to do the work at all.

But this view must necessarily be rejected in the light of what has already been said. The nature of the dispute has not been changed unless the action of Anaconda in taking over the switching operation can be regarded as that of an independent shipper not acting in concert with its carrier. It has been shown that this is not the case and that what Anaconda has done must be regarded as the act of the carrier. The dispute thus remains the same as when the section 6 notices were given.

On similar reasoning we agree with the conclusion of the district court that appellant has not maintained the status quo pending completion of the mediation proceedings, as required by section 6 of the act. This alone is enough to warrant dismissal of appellant's action for injunctive relief unless the decree sought to be entered would also require restoration of the status quo. Neither party has asked for the latter relief.

Injunctive relief may be utilized by either party to vindicate the process of the Railway Labor Act. *Virginia R. Co. v. System Federation No. 40,* 300 U. S. 515. But here appellant does not seek an injunction to compel utilization of Railway Labor Act procedures. Rather it wants to enjoin employees from resorting to self-help after appellant itself (through Anaconda) abandoned those procedures. In addition to the reasons given by the district court for denying such relief, it was also necessarily denied for the reason that appellant had not exhausted its administrative remedies.[10]

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[10] Section 8 of the Norris-LaGuardia Act, footnote 8, supra, 29 U. S. C. A., sec. 108. It may be noted that if this had been found to be a minor dispute instead of a major dispute an injunction could not have been obtained, because the dispute was not submitted to the National Railroad Adjustment Board. See Manion v. Kansas City Terminal Railway Co., 353 U. S. 927.

Appellant also argues that the controversy is not a "labor dispute" within the meaning of the Norris-LaGuardia Act, and that the sanctions of that act are therefore inapplicable. Again, however, this contention is predicated upon the view that the initial dispute came to an end when Anaconda decided to take over the switching operation at the new Berkeley Yard. This, as we have decided, is not true.

There are certain decisions which a carrier may make which cannot give rise to "labor disputes" within the meaning of the Norris-LaGuardia Act.[11] But we have concluded that the controversy which resulted in the strike threat in the matter before us was a major dispute within the meaning of the Railway Labor Act. It was therefore a "labor dispute" within the meaning of the Norris-LaGuardia Act. In any event, the latter act stands in the way of granting injunctions under certain circumstances. It provides no basis for the granting of an injunction.

Affirmed.

(Endorsed:) Opinion. Filed May 18, 1959.

Paul P. O'Brien, Clerk.

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[11] See Brotherhood of Railroad Trainmen v. New York Central Railroad Co., 6 Cir., 246 F. 2d 114; Chicago and North Western Railway Co. v. Order of Railroad Telegraphers, 7 Cir., F. 2d ____, decided March 13, 1959.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 883

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, a voluntary labor association; FRANK W. GLASS, individually and as Vice President of the Brotherhood of Locomotive Firemen and Enginemen; J. H. McCARVEL, individually and as General Chairman of the Brotherhood of Locomotive Firemen and Enginemen; BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary labor association; H. E. NEVALA, individually and as Deputy President of the Brotherhood of Railroad Trainmen; and R. R. McLEAN, individually and as General Chairman of the Brotherhood of Railroad Trainmen,

Petitioners,

vs.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Respondent.

BRIEF FOR THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY IN OPPOSITION

OPINIONS BELOW

The order of the District Court is unreported (Pet. p. 42). The opinion of the Court of Appeals is also unreported (Pet. p. 33).

JURISDICTION

The judgment of the Court of Appeals was rendered on January 10, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the United States District Court for the District of Montana properly denied petitioners' motion for leave to file a proposed supplemental answer and counterclaim, which was first made eleven months after judgment was rendered in the original cause and three weeks after the said judgment had become final by virtue of this Court's denial of a Petition for a Writ of Certiorari.

STATUTES INVOLVED

Federal Rules of Civil Procedure.

Rule 13:

"(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was com-

menced the claim was the subject of another pending action. As amended Dec. 27, 1946, eff. March 19, 1948."

Rule 13 (e).

Rule 13 (f):

"(f) *Omitted Counterclaim.* When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

Rule 15 (a); *Rule 15* (d).

Rule 59 (e):

"(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. Added Dec. 27, 1946, eff. March 19, 1948."

Rule 60.

STATEMENT

The statement contained in the petition (pp. 7-14) sets forth the facts and chronology of events material to consideration of the question presented.

ARGUMENT

Petitioners' motion for leave to file a supplemental answer and counterclaim was a double-barrelled attempt to (1) require the respondent to restore the "status quo" existing prior to institution of the original injunction action by respondent and (2) to nullify the force of the Montana State Court injunction which prohibited The Anaconda Company from taking the work claimed by petitioners from the jurisdiction of the International Union of Mine, Mill and Smelter Workers.

The claim for restoration of the "status quo" is clearly a compulsory counterclaim which under the provisions of Rule 13 (a) is barred unless timely pleaded. The ruling of the District Court on this point which was affirmed by the Court of Appeals presents no novel or important question which need be decided by this Court. Neither is the decision in conflict with any decision of another Court of Appeals on the same matter.

Petitioners did not even attempt to make any showing of excusable neglect which might move the lower court to exercise whatever discretion it may have had in the matter in petitioners' favor.

The portion of the proposed supplemental answer and counterclaim which in effect sought to defeat the jurisdiction of the state court had nothing to do with the merits of the original action.

Petitioners were making a second effort to obtain relief which was denied them by the Court of Appeals when they sought a Writ of Prohibition against the

Montana state court on May 18, 1959. In that case this court denied certiorari on October 19, 1959 (361 U.S. 846).

Then, as here, the petitioners sought to stay the jurisdiction of the Montana court without first attempting or exhausting the available and proper remedy of intervention in the Montana action.

As was pointed out in the decisions of the District Court and Court of Appeals, there is no conflict between state court action and the District Court judgment; hence, there is no need for the federal courts to exercise any control over the state court proceedings. Even if a conflict existed, it would be incumbent upon petitioners to intervene in the state court action and demonstrate any conflict there, thereby giving the state court the opportunity first to resolve the conflict if such there be.

It is respondent's position that, even if the proposed supplemental answer and counterclaim were proper, it was not timely and is barred by Rules 59 and 60.

CONCLUSION

Respondent submits that the determination of the issue in this case amounts to a factual and legal determination properly made adversely to petitioners under the Federal Rules of Civil Procedure. The decision of the Court of Appeals did not reach any important question of federal law which has not been, but should be, settled by this court, nor was the de-

cision in conflict with that of any other Circuit Court of Appeals on the same matter or with any applicable decisions of this court. For these reasons we submit the Petition for a Writ of Certiorari should be denied.

Dated, Butte, Montana,
May 5, 1961.

Respectfully submitted,
C. J. HANSEN,
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